

PREGNANT PERSONS AS A GENDER CATEGORY: A TRANS FEMINIST ANALYSIS OF PREGNANCY DISCRIMINATION*

DING

1. THE PUZZLE: HOW IS PREGNANCY DISCRIMINATION BASED ON SEX?

The U.S. Supreme Court in Geduldig v. Aiello: Discrimination on the basis of pregnancy is *not* discrimination on the basis of sex within the meaning of American gender equality law because pregnancy is distinctive to women as a gender category.

“The lack of identity between the excluded disability [i.e., pregnancy] and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—*pregnant women* and *nonpregnant persons*. While the first group is exclusively female, the second includes members of both sexes.” *Geduldig v. Aiello*, 417 U.S. 484, 497 n.20 (1974) (my emphasis).

“There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.” *Id.* at 496–97.

The prevailing feminist response: Discrimination on the basis of pregnancy counts as discrimination on the basis of sex *because* pregnancy is distinctive to women as a gender category.

“To deprive a woman . . . of disability pay because she is pregnant discriminates on the basis of sex because pregnancy has a *direct* relation to sex, and produces immediate disadvantages for employment for women only—and that is the end of the argument.” (Catharine MacKinnon, *Sexual Harassment of Working Women*, p. 123, her emphasis)

Explanatory challenge for trans feminism: If pregnancy discrimination disadvantages not just pregnant women but pregnant persons of *all* genders, how do we explain why pregnancy discrimination constitutes discrimination on the basis of sex within the legally relevant meaning of that phrase?

My view: Pregnancy discrimination is based on sex not because pregnancy is distinctive to women as a gender category but because pregnant persons make up a gender category of their own.

The crucial move here is to contest the assumption that the meaning of the term ‘sex’ that’s relevant to legal analysis is its biological meaning, not its social meaning—that is, *gender*.

In fact, on my reading, it is MacKinnon’s own radical feminist account of sex discrimination more broadly that commits her to the broad ideas behind this trans feminist analysis *avant la lettre*, except her explicit treatment of pregnancy discrimination never follows through on that commitment.

2. DISCRIMINATION AS UNEQUAL SOCIAL MEANING

Geduldig’s account (the “differences” or “difference” conception): Discrimination is differential treatment from similarly situated counterparts due to some underlying characteristic itself (mystified as a biological difference).

MacKinnon’s alternative (the “inequality” or “dominance” conception): Discrimination is systematic disadvantage enabled by the social meaning of a presumed biological difference.

*This handout is based on the one I used for my talk at the 2023 Harvard-MIT Grad Conference; the paper itself will be appearing in *Signs: Journal of Women in Culture and Society* 50.3 (Spring 2025).

Contrasting the two conceptions: Up until very recently, the Charter Day School (CDS) in North Carolina still saw fit to require girls to wear skirts, because apparently to be a lady is to be—as the school's founder explained in a deposition—"a fragile vessel that men are supposed to take care of and honor."¹

While the skirt requirement certainly treats the girls differently from the boys, it also treats boys just as differently from girls; if discrimination were what the differences conception says it is, then the skirt requirement would be as discriminatory toward boys as it is toward girls.

That's not how it works in reality, of course; the sex discrimination consists in the unequal social meaning embodied in that differential treatment, not the equally differential treatment as such.

As two of the girls then attending CDS stated to the district court below:

"The dress code and the constant monitoring by teachers and school administrators made me feel like they thought girls should not play roughly, or be as active and able to move around as freely and comfortably as boys—that we simply weren't worth as much as boys."²

"Girls having to wear skirts and dresses sends the message that girls should be less active than boys and that they are more delicate than boys. This translates into boys being put in a position of power over girls."³

Here's a useful way to draw out the contrast:

<i>Legally relevant meaning of ...</i>	<i>Differences conception</i>	<i>Inequality conception</i>
'Discrimination'	Formalistic meaning (i.e., differential treatment)	Substantive meaning (i.e., systematic disadvantage)
'Sex'	Biological meaning (i.e., biological difference)	Social meaning (i.e., gender)

Sex discrimination, so clarified, has nothing to do with any alleged sex differences themselves, yet everything to do with the oppressive social structures and forces that nurture differences, turn them into substantive disadvantages, and then purport to be justified by the meaning of those differences in the first place.

3. APPLYING THE INEQUALITY CONCEPTION TO PREGNANCY DISCRIMINATION

One would expect, then, that pregnancy in the sense suitable for an inequality analysis of pregnancy discrimination should likewise be a *gender* status and position at the social rather than biological level.

Even when it is a woman who is discriminated against on the basis of her pregnancy, the systematic disadvantages she faces consist not in the mere biological fact that she happens to be pregnant but in the unequal social meaning of that biology—which MacKinnon would theorize as womanhood.

In employment, for example, an inequality analysis should find pregnancy discrimination not in the biological fact of pregnancy, but in "the *meaning given* that biology" (MacKinnon, p. 121, *her emphasis*), *inter alia*,

1. Quoted in *Peltier v. Charter Day School (Peltier II)*, 37 F.4th 104, 113 (4th Cir. 2022) (*en banc*), *cert. denied*, 143 S. Ct. 2657 (2023). The plaintiffs challenged the dress code only as applied to cisgender girls.

2. Declaration of K.B. ¶ 19, *Peltier v. Charter Day School (Peltier I)*, 384 F. Supp. 3d 579 (E.D.N.C. 2019) (No. 16-cv-30), https://www.aclu.org/sites/default/files/field_document/2017.11.29_ecf_152-8_kb_declaration.pdf.

3. Declaration of I.B. ¶ 16, *Peltier I*, 384 F. Supp. 3d 579 (No. 16-cv-30), https://www.aclu.org/sites/default/files/field_document/2017.11.29_ecf_152-7_ib_declaration.pdf.

- a) “by the model of the job” (p. 121), which privileges the ability to work uninterrupted by health needs and childbearing work (which, socially, is hardly work at all);
- b) by “the disability plan, which covers women’s health needs only up to the cost of covering men’s” (p. 121); and
- c) by “the structure of the job market, which accommodates the physical needs, life cycle, and family expectations of men but not of women” (p. 118).

Another example (from Amy Reed-Sandoval, *Socially Undocumented*): Pregnant migrants of color who are *legally* authorized to cross the Mexico-U.S. border are still subject to systematic disadvantages because their visible pregnancy is interpreted *socially* as proof that they are undocumented and thus “illegal” after all; the discrimination here needs to be explained in terms of the social meaning of pregnancy as a presumption of illegality, not the underlying reproductive biology as such.

And yet, MacKinnon proceeds on the assumption that women as a gender category are systematically disadvantaged by the social meaning of pregnancy *because* women and only women become pregnant.

“Confronted with what looks to be a real difference between the sexes, [the differences] approach implicitly attributes it to biology. In this way, substantive judgments are made about which differences between the sexes are ‘real’ or ‘relevant’ (in terms of permissible differential consequences) without explicitly investigating which real differences and consequences may result *from sexism itself*.” (p. 120, my emphasis)

Except to find the social disadvantages of pregnancy discrimination in purportedly women’s reproductive biology *is* precisely to acquiesce in the pernicious myth that biology, not “sexism itself,” is what explains sex discrimination.

4. PREGNANT PERSONS REDUX

My diagnosis: What *Geduldig* gets wrong is not just its conception of discrimination as differential treatment, joined by a cissexist conception of pregnancy of distinctively women’s. Rather, there is another implicit assumption:

The binary conception of sex/gender: To discriminate on the basis of *sex* just is to discriminate on the basis of either *being a man* or *being a woman*.

Even on MacKinnon’s account, pregnancy discrimination counts as discrimination on the basis of sex only because pregnancy’s social meaning systematically disadvantages *pregnant persons qua women*.

This way, womanhood becomes the interpreter necessary for translating a complaint against pregnancy discrimination into a complaint against sex discrimination.

But there *is* no gap between sex and pregnancy discrimination waiting to be bridged in the first place.

My proposal: Pregnancy discrimination is based on sex because it bears on the social meaning of sex *directly* and *immediately*, not by way of womanhood.

My reading of Haslanger: Gender categories can serve as a powerful analytical tool for capturing and theorizing gender as the social meaning of sex, regardless of the ultimate merits of Haslanger’s own attempt at spelling out that meaning.

Women. The analytical category women consists of those who are “systematically subordinated along some dimension (economic, political, legal, social, etc.)” due to “observed or imagined bodily features presumed to be evidence of a female’s biological role in reproduction [*sic*].”

For our purposes, I offer the following modified version of Haslanger's account designed to sidestep important counterexamples:

Gender categories. An analytical category is gendered (for critical feminist analytical purposes) if but not only if its members are socially positioned as subordinate or privileged along some dimension (economic, political, legal, social, etc.) due to (actually or potentially) observed or imagined bodily features presumed (taken, suspected, expected, etc.) to be evidence of a (present, previous, or future) body socially interpreted as sexed one way or another.

On this account, the category of persons systematically disadvantaged because of the social meaning of their bodies being interpreted as pregnant comes out straightforwardly as a gender category—let's say, *pregnant persons*:

Pregnant persons: The analytical category *pregnant persons* consists of those who are systematically subordinated along some dimension (economic, political, legal, social, etc.) due to (actually or potentially) observed or imagined bodily features presumed (taken, suspected, expected, etc.) to be evidence of a (presently, previously, or future) body socially interpreted as pregnant.

Whether this might conflict with our pretheoretical intuitions or simply seem “too weird to say” is precisely beside the point; continuous with our assessment of scientific theories, intuitions about what's plausible would, *ceteris paribus*, do well to accommodate explanatory power, not the other way around.

“I offer this analysis as a way of capturing the standard slogan: gender is the social meaning of sex. Note, however, that in imagining ‘alternative’ genders we should be careful not to take for granted that the relevant biological divisions will correspond to what *we* consider ‘sex.’ (Alternative groupings could include: ‘pregnant persons,’ ‘lactating persons,’ ‘menstruating persons,’ ‘infertile persons,’ (perhaps ‘homosexuals,’ depending on the story given about physical causes)). Neither should we assume that membership in a gender will constitute one’s personal or psychological identity to any significant degree.” (Haslanger, “Gender and Race,” p. 50, my emphasis)

So, pregnancy can be gendered even if it is not gendered *woman* or even sexed *female*.

When a pregnant person is discriminated against because of pregnancy (properly understood, a social rather than biological status) they are discriminated against *as a pregnant person*—that is, directly and immediately, a case of sex discrimination.

Since the category of pregnant persons is itself gendered, to disentangle pregnancy from womanhood is *not* to ungender pregnancy (*pace* Barnes, MacKinnon, Ginsburg).

The category *pregnant persons*, on my account, appropriately includes many who are not, and perhaps may not be capable of becoming, pregnant (*pace* “No Uterus, No Opinion”).

The view avoids Jenkins-style worries about wrongful exclusion/marginalization/inclusion.

Gender categories: Theoretical constructs serving explanatory roles in critical feminist theory.

Genders (proper): The sort of building bricks that may make up part of who we authentically are.

While many gender categories (e.g., *pregnant persons*, *people with prostates*, *people with mustaches*) are not identity-anchoring and thus do not further constitute genders, all genders (e.g., *women*, *nonbinary people*) are explanatorily useful and thus further constitute gender categories.

Whether a gender category further constitutes a gender depends on whether it may anchor the construction of one’s authentic self (e.g., *butches* and *femmes* clearly do).